STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. ET09HE-63983-H
EEOC CHARGE NO. 17E-2013-00481

L.F.,	)	
	)	
Complainant,	)	Administrative Order
	)	
v.	)	**FINDING OF PROBABLE CAUSE**
	)	
Green Brook Board of Education,	)	
	)	
Respondent.	)	

On July 17, 2013, L.F. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Green Brook Board of Education (Respondent), discriminated against her based on a disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The ensuing investigation found as follows.

On or about August 22, 2011, Respondent, a public school district in Somerset County, hired Complainant as a school bus driver. On October 22, 2012, Complainant was injured in an automobile accident unrelated to her job, which caused her to miss work. During the following months, she submitted a series of medical notes to Respondent that included estimated return to work dates. For instance, on October 25, 2012, Rajesh Patel, D.O., issued a note stating that Complainant was unable to work until November 8, 2012, due to her injuries.

On November 20, 2012, a board certified physiatrist, Allan Tiedrich, M.D., Orthopedic Medicine Center, issued a note stating that she would be "totally incapacitated" until approximately December 19, 2012, with the remark, "stay out of work."

On November 26, 2012, Complainant submitted an FMLA leave application in which Tiedrich extended Complainant's recovery date to February 20, 2013.

During a November 26, 2012 board meeting, Respondent approved paid sick leave for Complainant from October 23 through December 5, 2012, and unpaid sick leave from December 5 through December 19, 2012.

Complainant's immediate supervisor, Transportation Supervisor Nancy Farinella, told DCR that she called Complainant once or twice a month during this period to check on her status. She said, "I had to make sure there was a resolution at the Board meeting to continue her leave. Each time the doctor's note ended her time out, I would need another doctor's note to update her information to the Board."

During a February 25, 2013 board meeting, Respondent approved extending Complainant's sick leave through June 30, 2013. In the meantime, Respondent covered Complainant's absence by asking its other drivers to complete additional "runs" and occasionally asking the mechanic or bus supervisor to drive a route.

On March 6, 2013, Tiedrich issued a disability certificate stating that Complainant would be totally incapacitated until approximately September 4, 2013. Superintendent Richard Labbe told DCR, "When we got the letter saying that [Complainant] would come back on September 4, we said we can hold on and make this work."

On or around April 16, 2013, Respondent received a *Medical Fitness Interval Report Notice* from the New Jersey Motor Vehicle Commission (DMV) stating that Complainant was clear to operate with her commercial driver's license (CDL). The DMV notice stated in part, "[W]e are pleased to advise you that you may keep driving passenger-carrying motor vehicles unless your passenger endorsement is suspended for other reasons."

Confused by the DMV notice, Labbe wrote to Complainant on April 24, 2013, asking that she clarify whether she was fit to operate a school bus. The letter stated, in part:

> At this time we have not made a determination as to whether to renew your contract for the 2013-14 school year. In accordance with the Federal Motor Carrier Safety Regulations (FMCSR) Title 49 CFR 391.4, in order for a district to consider your employment for the upcoming school year, you will need to provide documentation; whereby, your physician clears you to resume your position as a school bus driver.
>
> Please provide us with this information within thirty (30) days of your receipt of this letter so that we can make our determination prior to the end of this school year. . . .

On April 26, 2013, Complainant replied by producing a letter from a board certified neurosurgeon, David Poulad, M.D., Union County Neurosurgical Associates, which read in part:

> Please be advised that the above patient [Complainant] is under my care . . . and will be undergoing surgery the month of May [2013]. However, she will be released and cleared to work within the 2013-2014 school year as a bus driver.

Farinella stated that she found Poulad's projected return to work date—i.e., "within the 2013-2014 school year"—to be too vague. Similarly, Labbe told DCR that the messages appeared to be inconsistent:

> We get one letter saying she would come back to work on September 4 [the start of the next school year]. We said ok, we just need to get to the next school year. Then we get the letter from [DMV] that she was cleared to drive. That was confusing to us – how could she be cleared to drive when her doctor said she could not drive? That's when we received a letter saying she will come back

> some time within the 2013-14 school year, not saying at what point in the school year. That means I cannot hire a bus driver.

On May 13, 2013, Respondent sent a letter to Complainant stating that the status of her continued employment would be addressed at a May 28, 2013, board meeting. Complainant contacted Farinella several times in mid-May saying that she would do whatever was necessary to keep her job. There is no indication that Farinella or anyone else told Complainant that there was confusion about her return to work date, or mentioned the DMV issue. Farinella told DCR that she called and faxed DMV in an attempt to confirm Complainant's medical clearance for her CDL. Farinella stated that she never received a reply from DMV, and she made no further attempts to contact the agency. Farinella never asked Complainant to provide additional medical information or clarification to Respondent or DMV.

At the May 28, 2013 Board meeting, Respondent decided to terminate Complainant's employment.

The next day, Dr. Poulad performed Complainant's surgery. Her first post-surgery visit with Poulad occurred on June 7, 2013. On that date, Respondent alerted her that she would be discharged effective June 30, 2013.

On June 10, 2013, Complainant replied expressing her confusion over the situation and seeking clarification. Labbe responded in a June 12, 2013, letter, which read in part:

> We made the decision to not offer you a contract for the 2013-2014 school year and to end your employment with the District effective June 30, 2013, due to your unsatisfactory attendance record and that given the size of our District, we require an employee who will attend work on a regular and consistent basis.

On June 28, 2013,[2] Dr. Poulad faxed a note to Complainant stating, "Patient remains out of work and under my care for post-op treatment. Estimated return to work is 9-1-13." Complainant told DCR that she sent the letter to Respondent, and that in a subsequent phone call, Farinella apologized to Complainant but said that there was nothing further she could do. Respondent claims that it never received the June 28, 2013, note from Dr. Poulad.

The DCR investigator asked Farinella what hardship, if any, Respondent would have faced if it renewed Complainant's contract for the 2013-14 school year. She replied, "There would be no hardship for the 13-14 school year." She stated that one driver had announced her retirement and another had requested medical leave for the upcoming school year. Farinella noted, "Every year, by the grace of God, it always works out. Even with the retirement and the other person on medical leave for the new school year, and [Complainant] not being cleared to come back yet." She stated that if Complainant had returned to work by the beginning of the school year, she would have been able to put her back on the schedule with medical coverage.

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[2] The note is dated June 28, 2012. But that appears to be a typographical error because Complainant did not consult Dr. Poulad's office until after her October 2012 car accident.

However, Farinella said that there were legitimate concerns. She stated, "If they renewed her, my concern would be, her attendance was unsatisfactory in the 2012-13 school year. What if her attendance was unsatisfactory again? It would be a hardship again for the district. Not knowing what her attendance would be like for the 2013-14 school year. We never received a notice of when she could return. The doctor's note said sometime in the 2013-2014 school year. That was dated April 26 [2013]."

Farinella told DCR that some of the bus drivers who served Respondent's students were employed by the Somerset County Board of Education (the County), rather than Respondent. She said, "If I cannot do it with my staff, then I send it to the County. Every year for the past three years we had more than one run sent to the County."

Farinella said that for the 2013-14 school year, she hired two new bus drivers to replace the driver who was retiring and the driver who was going on sick leave, and "[t]he County took the place of the third driver." When asked if the "third driver" was Complainant, Farinella said, "Not necessarily. The County will take on routes that [Respondent] does not cover." Farinella stated that after Respondent decided to terminate Complainant's employment, she "asked the County to cover the run for the summer between the two school years and for the 13-14 school year."

Farinella stated that if Complainant returned to work, Respondent could have ended the arrangement with the County "[w]ithin three days." She said, "The Board of Ed, they decide. But there was never evidence of a day that [Complainant] was actually released. Yes, I could have given her a route."

Respondent stated that it paid approximately $47,000 to the County for busing services for the 2013-14 school year, whereas the combined salary and benefits for a driver employed directly by Respondent would have been approximately $40,000.

Complainant stated that after her June 28, 2013 post-surgery visit with Dr. Poulad, she fully expected to be able to return to work in September. However, her recovery did not progress as Dr. Poulad expected, and Dr. Tiedrich ultimately told her that she would not be able to drive a school bus again. On October 6, 2014, Dr. Tiedrich discharged Complainant from his care and suggested that she apply for Social Security disability benefits. In an October 22, 2014, interview, Dr. Tiedrich told DCR that Complainant would not have been able to return to work in September 2013, because after her surgery, she still had significant pain and reduced range of motion in her neck.

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56

(App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

It is settled that an employer cannot discriminate against an employee in the terms, conditions, or privileges of employment based on that person's actual or perceived disability. N.J.S.A. 10:5-12(a). It is equally settled that an employer must make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b).

To determine what accommodation is necessary, the employer must "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). Once an employee with a disability requests assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Ibid. An employer will be deemed to have failed to participate in the interactive process if (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400 (citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a); cf. Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation").

Moreover, an employer is required to assess each individual's ability to perform a particular job "on an individual basis." N.J.A.C. 13:13-2.5(a). An employer cannot simply succumb to generalized suspicions and unsubstantiated fears about a condition's possible effects. Cf. Jansen v. Food Circus Supermarkets, Inc., 110 N.J. Super. 363, 383 (1988); Greenwood v. State Police Train. Ctr., 127 N.J. 500 (1992).

Here, after allowing Complainant to take extended medical leave through the 2012-13 school year, Respondent received a doctor's note that Complainant was scheduled to undergo surgery in May but would be "cleared to work within the 2013-2014 school year." In spite of that clearance, Respondent decided in May 2013 to terminate her employment. At the time Respondent reached that decision, it had no medical opinion to support its suspicion that she would be unable to perform her duties. Respondent stated that its decision was based on what it viewed as the ambiguity of the phrase "within the 2013-2014 school year," its confusion with the fact that according to the DMV, she was authorized to operate under a CDL license, and its concern that she would return to work but then take excessive medical absences.

Complainant told DCR that she submitted a doctor's note to Respondent clarifying that her estimated return to work date was September 1, 2013, i.e., the start of the school year. Respondent claims that it did not receive that note. Still, it had Dr. Tiedrich's estimation that she would be able to return to work at the start of the school year, and Dr. Poulad's letter stating that

she would be released and cleared to work "within the 2013-14 school year." The fact that DMV considered her fit to operate commercial vehicles did not contradict her doctors' opinions that she could return to work as a bus driver. If her doctors had stated that she could drive a commercial vehicle and DMV found that she could not, then that would be a cause for confusion. But here, all sources were clearing her to return to work.

If Respondent had suspicions about whether Complainant would be able to perform the essential functions of her job after she returned to work, it could have put those questions to Complainant and her medical providers. It could have asked Complainant to be examined by its own doctors to gauge her fitness for duty. If it found Dr. Poulad's prognosis to be too vague, it could have sought clarification rather than just deem it unsatisfactorily. And if it did not want to do that, it should have relied on her doctors' prognoses to renew her contract for the upcoming school year.

There is a related issue of "undue hardship." Under the LAD, an accommodation is not "reasonable" and therefore not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; (c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3).

Here, Respondent stated that because Complainant's doctors kept extending her return date during the prior school year, it was difficult to obtain substitute drivers, and so it chose to terminate Complainant's employment to avoid the possibility of similar hardships for the 2013-14 school year. Shortly after reaching that decision, Respondent contracted with the County to provide a bus driver for the 2013-14 school year at a higher cost than it would have paid to Complainant as a direct employee. Farinella stated that if Complainant had returned to work at the start of the new school year, or at any time during the school year, Respondent could have simply ended the contract with the County and given a route to Complainant. And if Complainant went out again on leave, Respondent could have obtained a substitute driver from the County on three days notice, or presumably return to the methods it used after Complainant unexpectedly became injured during the 2012-13 school year. Thus, for purposes of this disposition only, the Director finds that Respondent has not demonstrated that allowing Complainant to return to work would have imposed an undue financial or administrative hardship, even if she took another medical leave. Indeed, when asked what hardship, if any, renewing Complainant's contract for the 2013-14 school year would have imposed, Complainant's supervisor replied, "There would be no hardship for the 13-14 school year."

In this case, there is no evidence of overt hostility. There is no evidence that Respondent maliciously sought to target Complainant for disparate treatment because she had a disability. Indeed, it appears that Respondent acted appropriately with regard to Complainant's employment for the 2012-13 school year. However, the fact remains that Respondent appears to have

terminated Complainant's employment based on its perception that she would be unable to perform her duties during the upcoming school year even though two doctors—a board certified physiatrist and a board certified neurosurgeon—stated that she would be fit to return to work. There is no indication that Respondent's belief was based on any medical evaluation.

Respondent guessed. The fact that it guessed correctly—it turns out that Complainant did not fully recover from the surgery and would have been unable to return to work even if allowed—does not negate the fact that Respondent did not follow the legally mandated process.

Because it appears that Respondent subjected Complainant to an adverse employment action based on its perceptions about the ramifications of her disability, the Director finds that there is a "reasonable ground of suspicion" to warrant a cautious person in the belief that" the LAD has been violated.[3]

DATE: 12-10-14

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[3] The evidence that Complainant was not ultimately able to return to work is relevant when assessing her claim for damages. However, it is not a factor in determining whether Respondent engaged in a good faith process to determine her ability to perform her job duties with or without reasonable accommodation.